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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

DOA 16-2024

CHAPTER 603

DEPARTMENT OF AGRICULTURE

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FILING CAPTION: Update to Presumptive Marijuana Testing Rules

EFFECTIVE DATE: 07/19/2024 THROUGH 01/14/2025

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NEED FOR THE RULE(S):

Following the passage of HB 4121 by the 2024 Oregon Legislature, the OLCC and ODA must develop rules to distinguish between marijuana and industrial hemp plants. The methodology must include testing criteria and cannabinoid concentrations above which immature or mature cannabis plants are presumptively considered to be marijuana.

JUSTIFICATION OF TEMPORARY FILING:

Delaying the implementation of these rules could compromise the Department's ability to protect public safety from high-THC agricultural products that exceed the legal THC limitation for hemp potency. ODA-licensed hemp growers with ODA Hemp Grow Site licenses will be affected by the implementation of these rules both in meeting the requirements for ODA visits to the grow sites and by any bad actors that are not meeting hemp license requirements.

Failure to immediately adopt, amend, or suspend the rules will result in the continued ambiguity and lack of detailed guidance in current presumptive marijuana rules. This includes how presumptive marijuana should be destroyed and how violations should be enforced, potentially leading to inconsistent enforcement and oversight.

The immediate implementation of these rules will provide clarity in defining presumptive marijuana, outline the circumstances warranting violations of ODA hemp licensure, and establish procedures for disposing of presumptive marijuana. It will also update rule numbers to align with recent legislative changes, ensuring consistent and effective regulation and enforcement.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

HB 4121 - Oregon Legislative website

OLCC rules - Secretary of state website

RULES:

603-048-1001, 603-048-8011, 603-048-8021, 603-048-8031, 603-048-8041

AMEND: 603-048-1001

RULE SUMMARY: Updates rule references to presumptive marijuana

CHANGES TO RULE:

603-048-1001

Presumptive Marijuana Violations

(1) It is a Class I violation of these rules to:¶

(a) Produce cannabis that is determined to be presumptively marijuana in accordance with OAR 845-026-410~~10~~ and the presumption is not rebutted in accordance with OAR 603-048-8010~~1~~ to 603-048-8040~~1~~.¶

(b) Fail to ~~timely~~ dispose of presumptive marijuana within a timeline specified by the Department, as required by OAR 603-048-8020~~1~~ or 603-048-8030~~1~~.¶

(c) Fail to permit or cooperate as described in OAR 603-048-0650 with an inspection to conduct presumptive marijuana sampling as described in OAR 603-048-8010~~1~~ by Department or its designee.¶

(d) Fail to comply with a detainment, seizure, embargo, or disposal order issued as described in OAR 603-048-8040~~1~~.¶

(e) Fail to ~~timely comply~~ comply within a timeline specified by the Department with any other requirement in 603-048-8010~~1~~ to 8040~~1~~.¶

(2) The Department may revoke, deny, or refuse to renew a grower's license if the grower commits any of the violations listed in section (1) of this rule.¶

(3) The Department shall revoke a person's hemp grower license or deny the person's hemp grower application for a license if the person fails to comply with OAR 603-048-0420~~0~~, including but not limited to if the cannabis subject to detainment, seizure, embargo, or disposal notice or order is removed from the location identified in the notice or order without prior permission from the Department.

Statutory/Other Authority: ORS 561.190, ORS 571.260-571.348, OL 2021~~4~~, Ch-542~~ap. 16~~

Statutes/Other Implemented: ORS 571.260-571.348, OL 2021~~4~~, Ch-542~~ap. 16~~

ADOPT: 603-048-8011

RULE SUMMARY: Establishes requirements for presumptive marijuana.

CHANGES TO RULE:

603-048-8011

Presumptive Marijuana

(1) For the purposes of this Division, unless the context provides otherwise or section (2) of this rule provides an alternative definition, the definitions in OAR 603-048-0010 apply.¶

(2) In addition to the definitions in section (1) of this rule, the following definitions apply:¶

(a) "Applicant" means a person, joint venture, or cooperative who has submitted an application for a grower license to the Department.¶

(b) "Good cause" includes, but is not limited to, when an action, delay, or failure to act arises from an excusable mistake, surprise, excusable neglect, reasonable reliance on the statement of a party or agency relating to procedural requirements, or from fraud, misrepresentation, or other misconduct of a party or agency participating in the proceeding.¶

(c) "OAH" means the Office of Administrative Hearings.¶

(d) "Pre-harvest testing" means sampling and testing of growing cannabis by a laboratory or the Department conducted in accordance with OAR 603-048-0600.¶

(e) "Presumptive test" means testing conducted in accordance with OAR 845-026-4110.¶

(f) "Licensee" means a person, joint venture or cooperative that produces industrial hemp and is licensed with the Department as a grower under ORS 571.281.¶

(3) In the Department's discretion, the Department or its designee may inspect and sample cannabis grown at a licensed or proposed grow site or grown pursuant to a grower's license to conduct presumptive testing as described in OAR 845-026-4110.¶

(4) A licensed grower or applicant must permit Department staff, or its designee, to inspect and access all parts of the grow site or proposed grow site, equipment, facilities, and any area where cannabis is grown pursuant to the license and cooperate with such an inspection in accordance with OAR 603-048-0650(3).¶

(5) Sampling for a presumptive test shall be conducted in accordance with OAR 845-026-4110.¶

(6) The Department may detain, seize, or embargo all cannabis at a grow site if any sampling at the grow site conducted pursuant to OAR 845-026-4110 contains total THC of 0.35 percent or more. Any such action shall be conducted in accordance with OAR 603-048-0900.¶

(7) Except for as specifically identified in OAR 603-048-8011 to 8041, the provisions of OAR 603-048-0010 to 603-048-2500 do not apply to OAR 603-048-8011 to 8041.¶

(8) OAR 603-048-8011 to 603-048-8041 apply to sampling and testing conducted for purposes of presumptive testing that occurred on or after July 15, 2024.

Statutory/Other Authority: ORS 561.190, 571.260-571.348, OL 2024, Chap. 16

Statutes/Other Implemented: 571.260-571.348, OL 2024, Chap. 16

RULE SUMMARY: Establishes Notice of Detainment requirements for Presumptive Marijuana

CHANGES TO RULE:

603-048-8021

Notice of Detainment for Presumptive Marijuana

(1) The Department may detain, seize, or embargo all cannabis that is determined to be presumptive marijuana pursuant to OAR 845-026-4110 in accordance with ORS 561.605 to 561.630.

(a) If the licensee or person in possession of the subject cannabis does not request a hearing within the timeline and manner described in written notification from the Department, withdraws a request for hearing, notifies the Department or the administrative law judge that they will not appear, or fails to appear at a scheduled hearing, the Department may summarily destroy or otherwise dispose of the cannabis, or summarily issue an order requiring the licensee or person in possession to dispose of the subject cannabis in accordance with OAR 603-048-0640.

(b) A licensee may only rebut a finding that the cannabis is presumptively marijuana by conducting valid pre-harvest sampling and testing that is performed by the Department in accordance with OAR 603-048-0600. Pre-harvest sampling and testing that is not performed by the Department is insufficient to rebut a finding that the cannabis is presumptively marijuana. The Department is not responsible for any costs for any pre-harvest testing.

(A) To request sampling and testing for purposes of rebutting a finding that cannabis is presumptively marijuana, within three (3) calendar days from the date the Department issued the notice of detainment, seizure, embargo a grower must submit to the Department, a completed sampling request form provided by the Department that includes:

(i) A written sampling request for THC analysis for each harvest lot, as identified by the harvest lot identifier, for which the grower is requesting sampling and testing and the total number of harvest lots to be sampled and tested;

(ii) A description of the location of the production area of each harvest lot, as identified by the harvest lot identifier, including the GPS coordinates or address of the harvest lot; and

(iii) A written description and visual depiction of each harvest lot to be sampled and tested such that the production area for each harvest lot is apparent from a visual inspection of the premises and easily discernible from other harvest lots.

(B) Harvest lots or production areas sampled and tested by the Department in compliance with OAR 603-048-0600 that pass testing under OAR 603-048-0600 may be released from detainment. The Department shall not issue an order to destroy until the time to request sampling and preharvest testing has expired.

(C) Cannabis that does not pass testing must be destroyed in accordance with 603-048-0640, except that when requesting approval to dispose of the presumptive marijuana in accordance with OAR 603-048-0640(2)(a), the licensee must submit the request at least two (2) calendar days, not including weekends and holidays, prior to disposal.

(2) Hearings.

(a) If a hearing is requested, as described in 603-048-8021(1)(a), the hearing and the order shall be issued as soon as practicable and not later than the timelines set out in this rule, unless the reason for the delay is explained in the final order.

(A) A hearing held pursuant to a timely request shall be conducted within 11-20 calendar days of the request unless:

(i) the Department requests a postponement; or

(ii) the licensee requests a delay and the administrative law judge determines there is good cause or the Department otherwise agrees to a postponement.

(B) The record shall be closed within 48 hours from the conclusion of the hearing.

(C) A proposed or final order must be issued by the administrative law judge within five (5) days, excluding weekends and holidays, from the closing of the record unless the administrative law judge determines there is good cause to delay the proposed or final order.

(b) OAH may select a hearing date and notify the licensee and the Department in writing. The hearing date may be changed with good cause.

(c) OAH may serve and communicate with the licensee by electronic mail unless the licensee requests in writing that service be accomplished by facsimile or regular mail. Service by e-mail is effective at the time a properly addressed email is sent. For cases where final order authority is delegated to OAH, OAH shall also mail a copy of the final order to the licensee.

(d) Discovery and Exchange of Exhibits and Witness Lists.

(A) Witness information and documents or objects planned to be offered as evidence as described in OAR 137-

003-0566(1)(a)-(c) must be exchanged no later than three (3) calendar days before the hearing date unless there is good cause for delay.¶

(B) Requests for production of documents to the Department are limited to the following:¶

(i) The licensee's application for the current license;¶

(ii) Sampling and testing documentation for the cannabis subject to the disputed notice of detainment; (iii) Any inspection report regarding the sampling and testing of the cannabis subject to the disputed notice of detainment prepared by the Department or the Department's designee.¶

(C) Requests for admission and written interrogatories are limited to a total of 10 separate requests (each subpart to count as a separate request).¶

(D) Depositions of Department witnesses, staff, or designees are not authorized.¶

(e) Motions for summary determination are not available in contested case proceedings regarding notices of detainment issued under this rule.¶

(f) A final order issued by OAH that finds in the Department's favor shall require the licensee or person in possession to dispose of the subject cannabis in accordance with OAR 603-048-0640 within ten (10) calendar days from the date of the order unless extended in writing by the Department.¶

(3) A licensee subject to a detainment, seizure, embargo, or disposal order under this section must comply with OAR 603-048-0900(4) except that the cannabis may be sampled by the Department for the purposes of pre-harvest testing in accordance with this rule.¶

(4) A licensee must dispose of presumptive marijuana ordered to be disposed of under this rule in accordance with OAR 603-048-0640, except that when requesting approval to dispose of the presumptive marijuana in accordance with OAR 603-048-0640(2)(a), the licensee must submit the request at least two (2) calendar days, not including weekends and holidays, prior to disposal. The licensee must dispose of the presumptive marijuana by the date the final order requires destruction unless extended by the Department in writing.¶

(5) The Department does not offer collaborative dispute resolution regarding notices issued under this rule.

Statutory/Other Authority: ORS 561.190, 561.605-561.620, 571.260-571.348, OL 2024, Chap. 16

Statutes/Other Implemented: OL 2024, Chap. 16, 571.263

RULE SUMMARY: Establishes requirements for Final Order of Disposal of Presumptive Marijuana

CHANGES TO RULE:

603-048-8031

Final Order of Disposal of Presumptive Marijuana

(1) For presumptive marijuana that meets any of the following criteria, the Department may issue a final order requiring destruction of all cannabis determined to be presumptively marijuana pursuant to OAR 845-026-4110:¶

(a) At least fifty percent of composite samples taken from mature plants test at or above ten percent total THC.¶

(b) The average total THC among the composite samples taken from mature plants tests at or above ten percent.¶

(2) A final order issued under this rule shall be appealable as an order in other than contested case order under ORS 183.484.¶

(3) A licensee may only rebut a finding that the cannabis is presumptively marijuana by conducting pre-harvest sampling and testing that is performed by the Department in accordance with OAR 603-048-0600. Pre-harvest sampling and testing performed by a laboratory is not sufficient to rebut a finding that the cannabis is presumptively marijuana. The Department is not responsible for any costs for any pre-harvest testing.¶

(a) To request sampling and testing for purposes of rebutting a finding that cannabis is presumptively marijuana, within three (3) calendar days from the date of the notification in subsection (1) a grower must submit to the Department, a completed sampling request form provided by the Department that includes:¶

(A) A written sampling request for THC analysis for each harvest lot, as identified by the harvest lot identifier, for which the grower is requesting sampling and testing and the total number of harvest lots to be sampled and tested;¶

(B) A description of the location of the production area of each harvest lot, as identified by the harvest lot identifier, including the GPS coordinates or address of the harvest lot; and¶

(C) A written description and visual depiction of each harvest lot to be sampled and tested such that the production area for each harvest lot is apparent from a visual inspection of the premises and easily discernible from other harvest lots.¶

(b) Harvest lots or production areas sampled and tested by the Department in compliance with OAR 603-048-0600 that pass testing under OAR 603-048-0600 may be released from detention.¶

(4) The Department shall amend or withdraw a final order if a harvest lot or production area passes testing under OAR 603-048-0600 and the grower complies with all requirements in this rule. A grower must destroy presumptive marijuana in accordance with the destruction order if:¶

(a) The presumptive marijuana does not pass testing under OAR 603-048-0600;¶

(b) Valid test results are not provided to the Department by the deadline specified by the Department; or¶

(c) The grower fails to comply with the requirements of this rule.¶

(5) A licensee must dispose of presumptive marijuana ordered to be disposed under this rule in accordance with OAR 603-048-0640, except that when requesting approval to dispose of the presumptive marijuana in accordance with OAR 603-048-0640(2)(a), the licensee must submit the request at least two (2) calendar days, not including weekends and holidays, prior to disposal. The licensee must dispose of the presumptive marijuana by the date the final order requires destruction unless extended by the Department in writing.

Statutory/Other Authority: ORS 561.190, 561.605-561.620, 571.260-571.348, OL 2024, Chap. 16

Statutes/Other Implemented: OL 2024, Chap. 16, ORS 571.263

ADOPT: 603-048-8041

RULE SUMMARY: Establishes requirements for presumptive marijuana compliance with Detainment, Seizure, Embargo, Disposal Notice or Orders

CHANGES TO RULE:

603-048-8041

Compliance with Detainment, Seizure, Embargo, Disposal Notice or Order

(1) A person subject to a detainment, seizure, embargo, or disposal notice or order based on a determination that the cannabis is presumptive marijuana must ensure that the cannabis subject to the action are not removed from the location identified in the notice of the action or subject to any harvesting, processing, or manufacturing processes without written permission from the Department.

(a) A person subject to a detainment, seizure, embargo or disposal notice or order shall take all reasonable steps to prevent theft or removal of the cannabis from the location identified in the notice of the action.

(b) A person subject to a detainment, seizure, embargo, or disposal notice or order is strictly liable for any violation of the notice or order, including removal of the cannabis from the location identified in the notice without permission or direction from the person subject to the action.

(c) A person subject to a detainment, seizure, embargo, or disposal notice or order may submit a written request to harvest, move, or take other action to preserve the cannabis pending a legal proceeding challenging the proprietary of the order. The person may only take such action upon written permission from the Department and subject to any requirements or restrictions imposed by the Department.

(2) The Department shall revoke a person's hemp grower license or deny the person's hemp grower application for a license if the person fails to comply with section (1) of this rule, including but not limited to if the cannabis subject to detainment, seizure, embargo, or disposal notice or order is removed from the location identified in the notice or order without prior written permission from the Department.

Statutory/Other Authority: ORS 561.190, 561.605-561.620, 571.260-571.348, OL 2024, Chap. 16

Statutes/Other Implemented: OL 2024, Chap. 16, ORS 571.263